No. 17-8995

In The
Supreme Court of the United States

JASON J. MONT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a statute directed to the administration of prisoners serves as authority to suspend the running of the supervised release portion of a sentence, when such "tolling" is without judicial action and requires the term "imprisonment" to include pretrial detention prior to an adjudication of guilt. Is a district court required to exercise its jurisdiction in order to suspend the running of a supervised release sentence as directed under 18 U.S.C. §3583(i) prior to the expiration of the term of supervised release when a release is in pretrial detention, or does 18 U.S.C. §3624(e) toll the running of supervised release while in pretrial detention?

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OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Sixth Circuit was not officially reported, but the opinion may be found at 723 Fed.Appx. 325. J.A. 33-46.

JURISDICTION

The Court of Appeals entered judgment on February 15, 2018. Pet. App. 1a. The petition for writ of certiorari was timely filed on May 15, 2018, and granted on November 2, 2018. J.A. 33. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following United States Code sections are implicated in resolving the Question Presented. The full text is contained in the Statutory Appendix to Petitioner's Merit Brief.

> 18 U.S.C. §3583. **Inclusion of a term of supervised release after imprisonment**
>
> (i) Delayed revocation.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the

adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 U.S.C. §3624. **Release of a Prisoner**

(e) Supervision after release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of

failure to pay such fines under sections 3611 through 3614 of this title.

STATEMENT

The court of appeals has interpreted a statute directed to post sentence administration of individuals who have been convicted of a federal offense and whose sentence requires service of a term of supervised release in a manner which strains the plain language and structure of the provision. The statute, 18 U.S.C. §3624, provides instruction to the Director of the Bureau of Prisons when an individual is approaching or has completed the incarceration portion of the sentence imposed by the sentencing court, including when and to whom release from incarceration is made. The Director is instructed to look to the sentencing judgment, and if a term of supervised release has been ordered, the Bureau of Prisons is to release the prisoner to the supervision of a probation officer. Supervised release begins at the time of release from incarceration, even when another term of probation or supervised release is also running. The statute provides that an individual cannot be released to supervision at the end of the custodial term if that individual is also serving a sentence of imprisonment for a separate offense, unless the term is less than 30 consecutive days.

The court of appeals has interpreted this provision incorrectly. The language of the statute states that "[a] term of supervised release does not run during any

period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." The Court of Appeals incorrectly interprets this language as suspending, or tolling the running of a supervised release term when a releasee has been held in pretrial detention for more than 30 days. This interpretation of §3624(e) lacks support in the plain language of the statute, as well as the statute's legislative history. The court of appeals erred in failing to require adherence to the clear directive in 18 U.S.C. §3583(i), which provides the district court with power to revoke supervised release after the release term has ended, but only so long as a timely warrant or summons has been issued.

A. Statutory Background

I. The manner and procedures for federal sentencing were upended through the provisions in the Sentencing Reform Act of 1984, Pub.L. 98-473, Tit. II, ch. II, 98 Stat. 1987, part of the omnibus Comprehensive Crime Control Act of 1984, Pub.L. 98-473, Tit. II, 98 Stat. 1976. The Sentencing Reform Act (SRA) reinvented sentencing, and along with the creation of the United States Sentencing Commission, represented a marked abandonment of most discretionary sentencing, restructured how courts impose sentence, and led to the eventual demise of the system of parole. Parole terms, which had been determined by the Bureau of Prisons during an inmate's term of imprisonment, were abandoned for the new concept of supervised

release, which shifted the prison sentence control dynamic from the Executive Branch to the Judiciary. S. Rep. No. 225, 98th Cong., 1st Sess. 1983, 1984 U.S.C.C.A.N. 3182.

A major part of the Sentencing Reform Act was the advent of supervised release. Supervised release essentially replaced the system of parole. It shifted authority for supervision from the Bureau of Prisons and the U.S. Parole Commission to the courts. See Pub.L. No. 98-473, Tit. II, §212(a)(2), 98 Stat. 1999. The Sentencing Reform Act provided that when a district court imposes a sentence for a misdemeanor or a felony, a term of supervised release may be imposed, to be served after imprisonment. 18 U.S.C. §3583(a). Many amendments to the supervised release statute have been promulgated. As the new sentencing rubric was implemented, gaps in the statute were filled to permit modifications and adjustments, and to clarify the scope of the court's power to regulate individuals while on supervision.

Title 18 U.S.C. §3624 explains that supervised release begins upon release from imprisonment, and that the supervised release term may run concurrently with any other term of supervised release, parole or probation that is running at the time of release. The statute also provides: "A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days." Further, the subsection states that a prisoner has to be

informed that the prisoner must satisfy any fine and the consequences for failure to pay those amounts.

Partly in response to some confusion as to whether an additional term of supervised release could be imposed if the person had been previously revoked and imprisoned, the Violent Crime Control & Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 contained amendments to 18 U.S.C. §3583 regarding revocation of supervised release after imprisonment. As a part of this clarification, the following subsection was added:

> "(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation."

18 U.S.C. §3583(i). See Pub.L. No. 103-322, Tit. XI, Subt. E, §110505, 108 Stat. 1796. The Sixth Circuit court erroneously reads this section in conjunction with that found at 18 U.S.C. §3624(e) to permit a "backward-looking analysis," finding that the district court had jurisdiction over petitioner, and that because no "temporal limitations" applied, to ignore the plain

language of the statute which requires the timely issuance of a warrant or summons. In their view, 18 U.S.C. §3624(e) had suspended, or tolled Mont's supervised release while he was detained in state custody pending resolution of state charges, and a warrant or summons could issue even after his period of supervision would otherwise have terminated.

B. Factual and Procedural Background

Jason J. Mont was initially convicted on December 8, 2005 for violations of 21 U.S.C. §§841(a)(1), (b)(1)(A), 846 and 18 U.S.C. §922(g)(1). He was sentenced to 120 months of imprisonment with an additional term of five years supervised release. His sentence having been reduced to 84 months upon the granting of a sentence reduction motion, Mr. Mont was released from the custody of the Bureau of Prisons on March 6, 2012. Thereafter, on March 7, 2012, Mr. Mont began his five-year supervised release term. ND-OH Rec.#77[1]. Because of the reductions from the original sentence imposed on December 8, 2005, Mr. Mont's sentence reduction resulted in his direct release from custody upon the granting of the sentence reduction motion. Mr. Mont had none of the transitional programming or community control as is typically offered while in the

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[1] "ND-OH Rec.#" refers to the record from the Northern District of Ohio, Eastern Division in Case No. 4:05-cr-229. The District Court's docket designations are contained in the Joint Appendix.

custody of the Bureau of Prisons serving the prison portion of the criminal judgment.

In March of 2015, Mr. Mont was indicted in Mahoning County, Ohio Common Pleas Court for Marijuana Trafficking, and was placed on bond after presentment in the Ohio court. Mr. Mont's probation officer became aware of the pending state drug charges, and when filing a January, 2016 violation report for failed drug tests and adulterated urine samples, included the pending charges in support of his request for a Warrant or Summons. ND-OH Rec.#89. At that time, Mr. Mont had served almost four years of his five-year supervisory term. Notwithstanding the probation officer's request and the pending charges, the district court determined that no warrant would issue. Instead, the district court directed only that she was to remain apprised of the status of the pending state law case. *Id.*

On May 26, 2016, a second state law indictment was issued against Mr. Mont, charging drug trafficking, and his bond in the 2015 marijuana trafficking case was revoked. Mont was given a bond for the new 2016 indictment, notwithstanding the increased severity of the later charges. Petitioner was arrested and incarcerated on the bond revocation from the 2015 case in Mahoning County Jail on June 1, 2016, and remained in state custody during all remaining relevant time periods. Throughout this process Mr. Mont's probation officer provided the district court with status updates, informing the court of the arrest, but did not request a warrant or summons. ND-OH Rec.#90.

By October of 2016, Jason Mont had entered pleas of guilty on both Mahoning County cases, agreeing to a six-year total sentence. After the entry of the plea, Mr. Mont filed an Admission of Violation of Supervised Release with the district court. He asked the district court to bring his violation forward, as he was aware that his pleas to the criminal offenses in state court amounted to a violation of the terms of supervised release. ND-OH Rec.#92. In response to the filing the district court entered a non-document order setting a violation hearing for November 9, 2016. No warrant or summons accompanied this scheduling order.

On November 2, 2016, counsel for the United States moved to continue the violation hearing, citing the fact that Mr. Mont had not yet been sentenced in state court. The United States recommended that the revocation hearing occur after sentencing in the Ohio court so as to avoid forum or "sentence shopping," apparently by Mr. Mont, as well as to avoid the "burden" of housing the defendant in federal custody. ND-OH Rec.#94. Objecting to the characterization of gamesmanship, counsel for Mr. Mont filed a response opposing a continuance, stressing resolution of his cases and including in the response a copy of Mr. Mont's binding six-year sentence in the Mahoning County plea agreement. ND-OH Rec.#95. In a non-document Order, the district court, citing its incorrect assumption that sentencing had been completed in state court, granted the Government's motion to continue the scheduled violation hearing. In December of 2016,

another non-document Order was issued, moving the violation hearing to January 26, 2017.

Subsequently, the Government filed another motion to continue the violation hearing, again alleging that Mr. Mont's actions in state court were for purposes of delay. The United States requested additional time until after the state law six-year sentence was imposed. ND-OH Rec.#96. Counsel for Petitioner filed in opposition to the continuance, again explaining that the delay with sentencing in Mont's state case had nothing to do with his federal supervised release. ND-OH Rec.#97. In a non-document Order, the district court settled the matter by ruling that no violation hearing would be held until Mr. Mont was formally sentenced in his state case, noting that the state conviction would be the basis of the supervised release violation. This Order was entered on January 20, 2017. None of the preceding motions or orders indicated that Mr. Mont's supervised release term was in any way tolled or suspended. Furthermore, no violation report, warrant, or summons was issued or served on either Mr. Mont or his counsel during any of the pleadings.

Mr. Mont's supervised release term expired on March 6, 2017, five years after his release from custody on March 6, 2012. Mr. Mont was subsequently sentenced in Mahoning County court on March 21, 2017. The Judgment was entered on the two cases on March 23, 2017. Mr. Mont received the aforementioned six-year sentence of imprisonment, apportioned to the counts and cases thereto. He received 305 days credit for time served in pretrial detention on the 2015

indictment, and 300 days credit for time spent in pretrial detention for the 2016 indictment.

A Violation Report and Warrant request was then filed on March 30, 2017, establishing that Petitioner had been sentenced in state court. The district court agreed, and a warrant was issued on March 30, 2017, 24 days after the expiration of the supervised release term. ND-OH Rec.#100. However, the delay continued again until counsel for Mr. Mont filed a Notice of Availability with the district court, seeking to have a definitive end to his federal case prior to designation to a state prison facility. ND-OH Rec.#102. In response, the district court ordered a violation hearing for June 28, 2017.

Prior to the June 2017 hearing, counsel for Mr. Mont filed a Memorandum in Aid of Proceedings, where he asserted that Mont's supervised release term had expired on March 6, 2017, and questioned the district court's jurisdiction to entertain a violation. ND-OH Rec.#107. At the June 28, 2017 hearing the district court addressed the jurisdictional issue. Counsel for the government averred that *United States v. Madden*, 515 F.3d 601 (6th Cir.2008) was dispositive, and that it calls for tolling when there are several interactions between the defendant, the court, and counsel for the government. J.A. 20. For their part, the probation officer argued that his Office considers anyone held in pretrial detention as being "unavailable" for supervision, thus "tolling" the period of supervised release. J.A. 21-22.

The district court's first finding on the question of jurisdiction turned out to be incorrect—that she had given notice by way of summons on November 1, 2016, when in fact no summons issued. Based upon that incorrect finding, the district court settled on authority granted her under 18 U.S.C. §3583(i), and determined the time at issue to be that which was reasonably necessary to adjudicate the violations. The district court noted that "the plain language of 3583(i), and that section states that a Court retains the power to impose a sanction for a supervised release violation beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising from its expiration." J.A. 23. The district court found that there was jurisdiction because the period between Mont's state law plea on October 7, 2016 and the June 28, 2017 hearing was a reasonable delay caused by Mont. J.A. 24. But in doing so, the district court " . . . left off a key conditional phrase . . . ", perhaps due to the mistaken belief that a summons had been issued—that the timeframe in question is only expanded "if, before [that term's] expiration, a warrant or summons has been issued. . . ." *United States v. Mont*, 723 Fed. Appx. 325, 327 at n.4 (6th Cir.2018). J.A. 24. The district court then sentenced Mr. Mont to 42 months of incarceration on the violations, to run consecutive to the six-year state law sentence. ND-OH Rec.#109.

C. Sixth Circuit Affirmed

The Sixth Circuit Court of Appeals affirmed the district court's jurisdiction to sentence Mr. Mont based upon the law violations, albeit on grounds different from those cited by the district court. J.A. 33-46. In doing so the court followed its earlier decision in *United States v. Goins*, 516 F.3d 416 (6th Cir.2008). Notwithstanding the fact that Mr. Mont's supervised release term had expired while he remained in pretrial detention under the authority of the state of Ohio, the Circuit Court cited to provisions in 18 U.S.C. §3624(e) as "tolling" the running of a supervised release term, and settling the jurisdictional issue.

The *Mont* panel described its application of 18 U.S.C. §3624(e) as an "interpretive riddle." "[D]oes thirty days or more of pretrial detention for a charge that results in (and is credited to) a conviction count as 'imprisonment in connection with' that conviction?" J.A. 40. While acknowledging a circuit split, the Sixth Circuit solved their riddle by using 18 U.S.C. §3624(e) as a rearview mirror, endorsing and employing a "backward-looking analysis" and explaining that "[1] when a defendant is held for thirty days or longer in pretrial detention, and [2] he is later convicted for the offense for which he was held, and [3] his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under §3624." J.A. 39-40, citing *Goins*, 516 F.3d at 417.

However even though they acknowledge a conflict among the circuits, the *Mont* panel did not address in substance Petitioner's argument concerning the conflicting language found in the opinions of other circuits, interpreting 18 U.S.C. §3624(e) differently—in a manner that precludes the rearview mirror, backward-looking concept. Rather than forthrightly addressing contrary analysis, like that found in the D.C. Circuit's decision in *United States v. Marsh*, 829 F.3d 705 (D.C. Cir.2016) (holding that pretrial detention does not apply to the language in §3624(e)), the *Mont* panel instead found that they were bound by their prior opinion in *Goins*. J.A. 44-45.

SUMMARY OF THE ARGUMENT

The decision of the Sixth Circuit is wrong in two major aspects. The first error was the determination that 18 U.S.C. §3624(e) tolled the running of Petitioner's supervised release term while Petitioner was held in pretrial detention for separate state law charges. This error reinforced a flawed interpretation of §3624(e), perpetuated by its earlier decision in *United States v. Goins*, 516 F.3d 416 (6th Cir.2008), and adopted by the appellate courts which have followed *Goins'* faulty interpretation.[2] Neither the structure,

[2] Cases which hold pretrial detention satisfies imprisonment in connection with a conviction: *United States v. Ide*, 624 F.3d 666, 667 (4th Cir.2010); *United States v. Molina-Gazca*, 571 F.3d 470, 471 (5th Cir.2009); *United States v. Johnson*, 581 F.3d 1310 (11th Cir.2009).

history or language of the statute support the appeals court's interpretation of the provision of §3624(e) in the manner used to extend the period of supervised release past the original term imposed at the time of sentencing. This Court's decision in *United States v. Johnson*, 529 U.S. 53 (2000) supports the fact that the plain language of 18 U.S.C. §3624(e) does not permit the backward-looking analysis used by the court of appeals which equate pretrial detention periods to a conviction, so long as the detention is later credited against a term of imprisonment.

The second error committed by the appeals court was the misapplication of 18 U.S.C. §3583(i), and its decision to disregard the failure to issue a warrant or summons prior to the expiration of Petitioner's supervised release term defeated the district court's authority to revoke supervised release. No warrant or summons was issued during Petitioner's pretrial confinement through the expiration of the five-year term of supervised release. The appeals court eschewed the necessity of preserving the sentencing court's power to revoke supervised release after the expiration of the term, disregarding the clear statutory language of §3583(i), which requires a pre-expiration assertion of jurisdiction in order to revoke or extend a term of supervised release.

The court of appeals created a strained and unworkable interpretation of 18 U.S.C. §3624(e) and ignored the unambiguous language of 18 U.S.C. §3583(i) through its ruling, based largely on that court's own precedent which itself contorted §3624(e) so as to not

reward a serial supervised release violator and absconder. The result in Petitioner's case was particularly problematic, given the many attempts made by Petitioner to resolve his supervised release issues while the five-year term was running.

ARGUMENT

I. THE APPEALS COURT'S DETERMINATION THAT PETITIONER'S PRETRIAL DETENTION IN STATE COURT TOLLED THE SUPERVISED RELEASE TERM BY ANALOGIZING PRETRIAL CONFINEMENT WITH IMPRISONMENT IN CONNECTION WITH A CONVICTION, PRIOR TO ANY CONVICTION, IS NOT SUPPORTED BY THE LANGUAGE OR HISTORY OF 18 U.S.C. §3624(e)

The plain language of §3624(e), which suspends the running of a supervised release term when the defendant is imprisoned in connection with a conviction for a Federal, State, or local crime, represents an unmistakable use of the present tense, and an unambiguous requirement that tolling occur only during the service of a term of imprisonment for a crime. Not only is Congress's use of the present tense unambiguous, so is the statute's requirement that the imprisonment imposed on a defendant result from a criminal conviction: pretrial detention is, by definition, prior to the adjudication of guilt and imposition of punishment. See, e.g., *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing

statutes"). In addition, the statutory text of §3624(e) and the legislative purpose of supervised release all point in the same direction: notwithstanding any later grant of credit for time served, §3624(e) does not apply to pretrial detention.

A. For Tolling of Supervised Release under §3624(e), a Defendant must be Imprisoned on a Criminal Conviction Contemporaneous to Tolling

"The starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993). Answering an "interpretive riddle" is sometimes as simple as looking to the plain language of the statute. After all, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (citing *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

Beginning with the plain language of the statute at issue, it is clear that Congress chose to use the present tense in setting forth when supervised release is suspended: "A term of Supervised release does not run during any period in which the person *is imprisoned in connection with a conviction* for a Federal, State, or local crime. . . ." 18 U.S.C. §3624(e) (emphasis added). The plain, logical reading of the language indicates two

dispositive points: that the statute uses the present tense, which provides the temporal basis for when "imprisonment" occurs; the second point is that "imprisonment" is for a crime for which a person has been adjudicated, sentenced and confined. Pretrial detention which is credited toward the service of a term of incarceration fails to satisfy the temporal parameters of the statute. Neither is pretrial detention "imprisonment" as the term is used in §3624(e).

1. This Court has consistently held that statutes written with present-tense verbs, such as in §3624(e), do not apply to past acts. See, e.g., *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."). And use of the present tense throughout subsection 3624(e) signifies Congress's intention to establish the temporal ambit of the statute. One "cardinal rule" of statutory interpretation is that "[s]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (citing *Jones v. United States*, 527 U.S. 373, 389 (1999)). Put another way, the plain meaning of key words in the statute is informed by the surrounding words.

Here the words throughout the subsection are present tense. Petitioner submits that the pervasive use of the present tense throughout the subsection is a manifestation of Congressional intent to ground the statute in the present in anticipation of a prisoner's

release after incarceration: "[t]he term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any . . . term of probation, supervised release, or parole for another offense to which a person is subject, or becomes subject during the term of supervised release." 8 U.S.C. §3624(e).

Use of the present tense throughout the statute indicates the clear, unambiguous intent on the part of Congress that the phrase "is imprisoned in connection with a conviction for a Federal, State, or local crime" requires a conviction and incarceration, not pretrial detention prior to adjudication of guilt or sentencing. See, e.g., *Carr v. United States*, 560 U.S. 438 (2010) (where the Court determined that the SORNA travel requirement's use of the present tense ("travels") rather than in the past or present perfect ("traveled" or "has traveled") reinforces the conclusion that pre-enactment travel falls outside the statute's compass). *Id.* at 447-448 ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option" (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987)).

2. Section 3624(e) was reviewed in *United States v. Johnson*, 529 U.S. 53 (2000), where the issue related to whether supervised release could be credited to imprisonment which lasted beyond the legally authorized term. In resolving the issue, the Court determined that the statute "suggested a strict temporal interpretation, not some fictitious or constructive earlier time," and

that "[i]ndeed, the third sentence admonishes that 'supervised release does not run during any period in which the person is imprisoned.'" *Johnson*, 529 U.S. at 57. Indeed, the Sixth Circuit addressed the strict temporal analysis in *United States v. Goins*, but eschewed this Court's direction, deciding instead to find that the temporal discussion in Johnson was isolated to the subsection's release from imprisonment language.[3]

The District of Columbia Circuit Court of Appeals, in disagreement with the Sixth Circuit's interpretation of §3624(e), presented the appropriate analysis. In

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[3] Notwithstanding the Sixth Circuit's recognition of the temporal analysis, the appeals court chose not to apply it to the full subsection, leaving out the verb "is" in its application of the statute:

> To understand why "imprisoned in connection with a conviction" appears to lack any temporal limitation, it is instructive to consider Goins's claim that tolling for pretrial detention would violate the Supreme Court's "strict temporal" approach in *Johnson*. We reject Goins's temporal argument because Goins ignores what created the "strict temporal interpretation" for the Supreme Court: the specific language of the statute. The Supreme Court in *Johnson* found itself bound to a "strict temporal interpretation" because the statute itself used the phrase "on the day the person is released," a phrase that limited the court to a certain temporal perspective. §3624(e); *Johnson*, 529 U.S. at 57, 120 S.Ct. 1114. In stark contrast, the very next sentence in §3624(e), "imprisoned in connection with a conviction," does not make reference to any temporal perspective. Thus, despite its backward-looking approach, a pretrial detention that leads to a conviction, and is later credited as time served, is "in connection with a conviction."

United States v. Goins, 516 F.3d 416, 423 (6th Cir.2008).

United States v. Marsh, 829 F.3d 705 (D.C. Cir.2016), that court provided cogent, simple, and easily applicable reasoning based on the plain reading of the language to find that pretrial detention does not toll the running of supervised release:

> Critically, the statute provides that "[a] term of supervised release does not run during any period in which the person *is* imprisoned in connection with a conviction for a Federal, State, or local crime. . . ." 18 U.S.C. §3624(e) (emphasis added). By phrasing the statute in the present tense, Congress has foreclosed the type of backward-looking tolling analysis that the Fourth, Fifth, Sixth, and Eleventh Circuits allow. When a person is held in pretrial detention, one cannot say that the person "is imprisoned in connection with a conviction for a Federal, State, or local crime" for an obvious reason: he has yet to be convicted. To be sure, if the person is later convicted and receives credit for time served, it might be appropriate to say that the person was imprisoned or has been imprisoned "in connection with a conviction." But Congress did not phrase the statute in the past or present perfect tense; it framed it in the present.

Marsh, 829 F.3d at 709. See 1 U.S.C. §1: "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words used in the present tense include the future as well as the present;" *Carr*, 560 U.S. at 448: "By implication, then, the Dictionary Act instructs that the present tense generally does not include the past."

The use of the present tense throughout §3624(e) clarifies that being held in pretrial detention cannot be an equal to "is imprisoned in connection with a conviction" for a crime. Any other reading ignores the plain meaning of the statute, and Congressional intent. Had Congress intended it otherwise, they would have drafted it so. For example, if Congress had intended the analysis to be framed as the Sixth Circuit suggests, they could have drafted the statute in the present perfect tense. A statute so drafted might read "[a] term of supervised release does not run during any period in which the person ***will have been*** imprisoned in connection with a conviction for a Federal, State, or local crime. . . ."; had they intended a past tense analysis, the statute might read "[a] term of supervised release does not run during any period in which the person ***has been*** imprisoned in connection with a conviction for a Federal, State, or local crime. . . ." Instead, Congress made a clear, unambiguous choice to remain in the present tense. This Court should answer the "interpretive riddle" consistent with the D.C. Circuit and the plain language of the statute, not through some "curious, narrow, or hidden" analysis.

B. The Sixth Circuit's Tortured Reasoning in Applying §3624(e) is Unsupported by the Rules of Statutory Interpretation

The courts of appeals which have held pretrial detention tolls the running of supervised release have based their reasoning on the statute's phrase "imprisonment in connection with a conviction," and have in

large part ignored the temporal reach of the statute as discussed herein. Each of these appeals courts have recklessly decided to square the language of the statute with the facts of their case in order to salvage a revocation imposed after the expiration of a defendant's supervised release term. Such post hoc, "backwards-looking" reasoning has led to interpretations of §3624(e) that were never part of the statute's purpose, including its temporal interpretation as revealed in *Johnson*. The lower courts have also failed to follow proper statutory analysis which give effect to all of the statute's provisions, "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009).

1. The awkwardness of the court of appeals' analysis lays bare its fault. As the Sixth Circuit provided in *Mont*, the "interpretive riddle" relies upon looking back to determine whether a defendant's pretrial detention in Federal, State, or local court resulted in a conviction; whether there was a sentence imposed greater than 30 consecutive days; and whether the pretrial detention was later credited to the term of imprisonment after the conviction and sentence. J.A. 40-43. A plain reading of the statute finds the "interpretive riddle" an unnecessary construct.

Pretrial detention is not imprisonment caused by a criminal conviction, a fact of which Congress was well aware at the time 18 U.S.C. §3624 was enacted.[4]

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[4] Pretrial detention has historically been to ensure attendance, not to punish for some future conviction:

Along with the passage of the Sentencing Reform Act, the omnibus Crime Control Act of 1984 also included passage of the Bail Reform Act. In the Bail Reform Act, the purpose for detention proves to be very different than the purpose for imprisoning a person convicted of a crime—the purpose of detaining an individual prior to adjudication of guilt was to assure the individual's presence for court proceedings, and to protect the public, whereas the purpose for imprisonment after conviction was to punish and, to a lesser degree, rehabilitate. See S. Rep. 98-225, 98th Cong., 1st Sess. 1983, 3192, 3193. It is a "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citing *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)). Similarly,

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> "But, notwithstanding [the] general presumption of innocence, the successful prosecution and punishment of crimes require that the necessary precautions be taken to secure the presence of the accused during the trial and afterwards, in case of conviction, and the fear of a default in attendance becomes greater in proportion as the likelihood of conviction increases."
>
> Another phase of preliminary confinement, which is permitted in the furtherance of justice, is the commitment of witnesses in criminal cases. . . .
>
> "Since the preliminary confinement is ordered only to insure the attendance of the accused at the trial, the confinement can only be continued as long as there is any reasonable danger of his default."

Christopher G. Tiedeman, *A Treatise on State and Federal Control of Persons and Property in the United States considered from both a Civil and Criminal Standpoint*, §32 (St. Louis: The F.H. Thomas Law Book Co., 1900) Vol. 1.

when "Congress includes particular language in one section of a statute but omits it in another . . . this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Had Congress intended to equate pretrial detention with imprisonment for a criminal conviction in 18 U.S.C. §3624(e), enacted as part of the Sentencing Reform Act, simultaneously with the Bail Reform Act, it certainly would have found no better moment than within the omnibus Comprehensive Crime Control Act.[5]

2. Respondent references alternative definitions of "imprison" in Webster's Third New International Dictionary, which defines "imprison" as "to put in prison: confine in a jail" or to "limit, restrain, or confine as if by imprisoning"; in the Prison Litigation Reform Act, 18 U.S.C. §3626(g)(5);[6] and in the oft-reference general arrest statute, 18 U.S.C. §3041; as proof that pretrial detention and imprisonment are synonymous. Resp. Opp. Cert. at 10. Many of the appeals courts following the Sixth Circuit's decision in *Goins* have also referred to these sources as justification for applying pretrial detention to imprisonment in connection with

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[5] *King v. Burwell*, ___ U.S. ___, 135 S.Ct. 2480, 2495 (2015) ("[C]ontext and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.")

[6] The Prison Litigation Reform Act has its own definitional section to be used in actions under the PLRA. See 18 U.S.C. §3626(g).

a conviction for a crime.[7] However, using these varied definitions to resolve a statutory interpretation issue fails to follow the well-settled rules of statutory construction: "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993).

The language of the statute cannot be parsed to satisfy an interpretation which bears no logic with the purpose of the provision. Stopping, or pausing a term of supervised release when a defendant is imprisoned based upon a conviction and judgment makes practical sense from the standpoint that the purpose of supervised release is to provide assistance to a defendant released from prison in his or her integration back into society and for rehabilitation. District courts are provided continuing supervisory authority to monitor the progress of a supervised releasee and to adjust the terms of supervision as needs arise. S. Rep. No. 225, 98th Cong. 1st Sess. 124 (1983). Indeed, contrary to assertions made by Petitioner's probation officer that pretrial detention makes an individual "unavailable" for supervision, the ability to monitor during pretrial detention was evidenced in Petitioner's case. Petitioner's probation officer was able to both visit Mont while detained, and provide updates to the district

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[7] In *United States v. Ide*, 624 F.3d 666, 670 (4th Cir.2010), the appeals court followed the reasoning in *Goins*, citing the "imprisoned" contextual comparison from 18 U.S.C. §3041's use of the phrase "arrested and imprisoned or released . . . for trial."

court, while Petitioner was held in the local county jail. ND-OH Rec.#90.

The language of §3624(e) requires a conviction and the service of a sentence on that conviction in order to suspend or toll the running of supervised release. That the term "imprison" has, in isolation, different meanings is not permission to impose these alternative meanings to a statute which is capable and clear on its own. Even accepting Respondent's argument as true, the fact that there are alternative meanings to the word is of no consequence to this case or to this Court: "We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, ___ U.S. ___, 135 S.Ct. 1074, 1082 (2015) (internal citations omitted). This Court can therefore find for the Petitioner on the definitional issue, and yet avoid further definitional conflict regarding the meaning of the word "imprisonment."

3. The phrase "in connection with" provided the "interpretive onramp" for the Sixth Circuit in *United States v. Goins* to find that pretrial detention, later credited to a criminal conviction and sentence, was "in connection with a conviction" for purposes of tolling Mont's supervised release. However, the statute's reference to imprisonment in connection to a conviction for a crime, and a plain language understanding of it, would direct the reader to imprisonment for violation of parole or supervised release. A revocation of supervised release which includes a

term of re-imprisonment is not a new offense—the re-imprisonment is *in connection with* the prior Federal offense. See, e.g., *Johnson v. United States*, 529 U.S. 694, 700 (2000) (Sanctions for violating supervised release, including re-imprisonment, relate back to the original offense, avoiding double jeopardy concerns). This interpretation does not require imposing a backward-looking analysis employed by the lower court, while respecting the plain meaning and intent of Congress.

Any other reading of "in connection with" that calls for inclusion of a pretrial detention term requires significant inquiry into the bond and bail practices of whatever jurisdiction is holding the defendant, the specific charges levied against the defendant, and if there is a conviction, whether the sentence that flows from the conviction is the same charge which caused the pretrial detention in the first instance. The contingencies involved in making such a determination is an affront to the strict temporal interpretation of the statute, and is largely unworkable. Federal terms of imprisonment are calculated in accordance with 18 U.S.C. §3585, and the sentence commences when the individual arrives at the designated location for service of the sentence. *Id.* at §3585(a). The statute describes this location as "official detention facility." Section 3585(b) sets forth the procedure to obtain credit for time served, and allows credit to be given to any time spent in official detention not credited to another sentence. These procedures do not account for the myriad procedures in the separate sovereign courts where a

supervised releasee may be detained, making any application of pretrial detention in the separate sovereigns a minefield that the statute does not require a court to navigate.

II. TO PRESERVE THE ABILITY TO REVOKE SUPERVISED RELEASE AFTER EXPIRATION OF THE TERM IMPOSED, A DISTRICT COURT IS REQUIRED TO FILE A WARRANT OR SUMMONS IN ACCORDANCE WITH 18 U.S.C. §3583(i)

Assured that the tolling analysis would offer sufficient time to revoke Petitioner's supervised release, the Sixth Circuit determined that the district court's inadvertence in failing to file a summons or warrant prior to the expiration of Petitioner's supervised release term was of no moment. The appeals court simply added the 10 months of pretrial detention to Mont's term of supervised release, and the issue was no longer significant to the circuit court's analysis. But 18 U.S.C. §3583(i) shows that the Sixth Circuit's solution to their "interpretive riddle," and their backward-looking tolling structure, to be unnecessarily complex—18 U.S.C. §3583(i) provided the district court with the authority to hold the June, 2016 violation hearing, notwithstanding the expiration of the supervision term on March 7, 2016. The district court simply had to issue a timely summons or warrant.

Section 3583(i) is a necessary prerequisite for a district court to follow in order to preserve its authority

when there is a clear possibility that a defendant's term of supervised release may expire prior to the opportunity to hold a revocation hearing. The appeals court's treatment of the provision may reflect the fact that the Court has yet to issue any opinion addressing the jurisdiction, or power of the court to make changes to an expired term under §3583(i). Petitioner suggests that §3583(i) was intended to extend jurisdiction over an expired supervised release term, and as a jurisdictional issue, provides the opportunity herein to raise the issue notwithstanding the Sixth Circuit's decision.

A. 18 U.S.C. §3583(i) Provides Subject-Matter Jurisdiction over Expired Supervised Release Terms

1. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). While district courts have original jurisdiction over offenses against the laws of the United States, 18 U.S.C. §3231, courts faced with expiring supervised release terms and violation conduct, were often challenged based upon their authority to revoke or amend supervised release after the term had expired, even when notice of the violation was given prior to the term's expiration.[8] Congress

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[8] See *United States v. Neville*, 985 F.2d 982 (9th Cir.1993), where a show cause order was issued prior to the expiration of the term of supervised release, but the hearing on the matter extended beyond the expiration. The *Neville* Court upheld the

recognized the lapse of authority in the supervised release statute, and in 1994, 18 U.S.C. §3583 was amended to include the current version of §3583(i).[9] See Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, §110505, 108 Stat. 1796, 2017.

2. This Court has issued recent, clear, guidance which assists in deciding whether or not 18 U.S.C. §3583(i) is jurisdictional. See *Gonzalez v. Thaler*, 565

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revocation, based upon implicit authority to revoke within a reasonable time, in reliance on the language in the probation statute relative to delayed revocations. 18 U.S.C. §3565(c).

[9] An Explanation of Provisions was made part of the Congressional Record, and provided the reasons why §3583(i) was needed:

> Under existing 18 U.S.C. §3565(c), a court has authority to revoke probation after the term of probation has expired in the limited circumstances where a warrant or summons alleging a violation was filed prior to the end of the probation term. In such a case, the court has continued jurisdiction to revoke and resentence for a "reasonably necessary" period beyond the expiration of the probation term.
>
> In contrast, existing statutory law is silent in respect to court authority to adjudicate alleged violations of supervised release and, if warranted, revoke supervised release after a term of supervised release has expired. The proposed legislation fills the gap in the current law by providing continued court jurisdiction to adjudicate alleged supervised release violations and revoke supervised release if a warrant or summons was timely filed before the end of the supervised release term. The proposed language parallels the existing statutory provision for delayed probation revocation.

137 Cong. Rec. S7769-01 (1991).

U.S. 134 (2012). In Petitioner's case, the Sixth Circuit relied upon its prior decision relative to §3624(e) in *Goins*, and therefore identified 18 U.S.C. §3583(i) as being irrelevant to the issue. J.A. 42, 43. But "[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented. See *United States v. Cotton*, 535 U.S. 625, 630 (2002). Subject-matter jurisdiction can never be waived or forfeited." *Thaler*, 565 U.S. at 141. Therefore, Petitioner submits that the jurisdiction determination is ripe for review.

In *Thaler*, clear rules were set forth to determine whether a statute was jurisdictional: "We accordingly have applied the following principle: A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" But if "Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional." *Thaler*, 565 U.S. at 141 (internal citations omitted). Put another way, the "clear intent" of the legislature may be discerned through a review of the statutory language; the context; and the purpose of the time limitation. *Dolan v. United States*, 560 U.S. 605 (2010) (noting that "[i]n answering this kind of question, this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes" of the statute.)

The language of §3583(i) suggests that the statute is jurisdictional. The use of words such as "extends"

and "power of the court" suggest that the statute was meant to grant authority to the district court. See, e.g., *Landgraf v. U.S. Film Prods.*, 511 U.S. 244, 274 (1994). More than a claims-processing rule, §3583(i) deliberately sets forth the mechanism to extend the reach of the district court beyond an original judgment, by providing the means to preserve jurisdiction for supervised release terms which are subject to revocation, and close in time to completion.

The legislative history provides a clear statement as to the purpose for making such changes to the supervised release statute. The concerns of the Senate Judiciary Committee were evidenced in the Explanation of Provisions, which speaks of the amendment providing "continued court jurisdiction" to amend or revoke supervised release, so long as a warrant or summons is filed. 137 Cong. Rec. S7769 (1991). Indeed, the provision mirrors that in the probation statute, and referred to the same as providing courts with jurisdiction to amend probation terms that had expired, so long as a warrant or summons had been filed. See 18 U.S.C. §3565(c).

B. The Sixth Circuit Erred by Failing to Address the District Court's Failure to Invoke its Jurisdiction under §3583(i): the District Court was Without Jurisdiction to Impose any Sentence on Petitioner's Expired Term of Supervised Release

1. If 18 U.S.C. §3583(i) is found to be jurisdictional, Petitioner submits that the court of appeals committed error in dismissing the challenge to the lack of a warrant or summons filed in the case, and reversal is required. According to the Respondent the record is unclear as to whether the district court filed a summons in Petitioner's case. There was indeed some discussion at the supervised release revocation hearing where the district court suggested that a summons had been issued. Resp. Opp. Cert. at 17. However the district court's apparent confusion on the issue, the record is clear—there was no summons or warrant issued by the district court in Petitioner's case. Indeed, the district court would likely have not issued a summons to Mont, who was housed in Mahoning County Jail. It is not a general practice to use a summons to signal a pending court appearance when a person is in custody. Therefore, there is no record of a summons or warrant, until March 30, 2017, 23 days past the expiration of Jason Mont's supervised release term.

2. The district court had at least three opportunities to issue a warrant based upon Petitioner's several violations of the terms and conditions of supervised release. That the district court decided to wait until Petitioner was sentenced in state court was

not a bar to the filing of a warrant prior to the expiration of the term of supervised release. Indeed, the term of release was presented on each violation report filed by the probation officer, which set forth the date Petitioner was released from imprisonment, March 6, 2012, and that the term imposed in 2005 at the time of sentencing was a five-year term. ND-OH Rec.##89, 90, 100. Had a warrant been filed in November of 2016, the warrant would have acted as a detainer, which in effect would have been to provide notice to the state actors and to Petitioner that a supervised release violation hearing was forthcoming after resolution of the state criminal case. The warrant would have also satisfied the jurisdictional prerequisites under 18 U.S.C. §3583(i).

The district court chose not to preserve its power over Mont until that ability was extinguished through termination of the supervisory term. The Sixth Circuit's decision to use tolling under §3624(e) by authority of its prior, flawed precedent to preserve the district court's jurisdiction to revoke Mont's term of supervision was error.

CONCLUSION

For the foregoing reasons, the Sixth Circuit Court of Appeals opinion should be reversed.

Respectfully submitted,

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